83-450

No.

Office-Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1983

NO.

HOWARD A. HULL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Filed September 16, 1983.

QUESTIONS PRESENTED

I. In a criminal tax prosecution, must the Trial Court submit to the jury the question of legal residence/venue, where there is a dispute as to the factual existence of venue? (The First, Second and Fifth Circuits hold yes; the Third Circuit holds no.)

II. In a charge of willful failure to file a federal income tax return, 26 U.S.C. §7203, is the prosecutor required to prove beyond a reasonable doubt, legal residence/venue. (The Second, Fifth, Ninth, and Tenth Circuits hold yes; the Third Circuit holds no.)

III. Does the accused in a criminal tax prosecution have, under 26 U.S.C. §3237(b), the absolute right to change the venue to his place of legal residence? (The Fifth, Seventh and Ninth Circuits hold yes; the Third Circuit holds no).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO.

HOWARD A. HULL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the order of August 12, 1983 of the United States Court of Appeals for the Third Circuit, which order denied Petitioner's Motion for Rehearing or in the Alternative Suggestion for Hearing or Rehearing en banc, and to

review the Judgment of July 18, 1983 of said court which Judgment affirmed the conviction of this Petitioner.

OPINION BELOW

Petitioner appealed his conviction from U.S. District Court in the Western District of Pennsylvania to the U.S. Court of Appeals for the Third Circuit. In an unpublished "judgment order", the Third Circuit, without any opinion or citation of case law, affirmed the conviction. (Appendix A.) The Court held, inter alia, that:

(1) The District Court did not err in denying Defendant's motion for change of venue.

(2) The evidence was sufficient to establish Defendant's legal residence and venue at Pittsburgh, Pennsylvania, and,

(3) The Government was not required to prove legal residence/venue beyond a reasonable doubt.

"Petition for Rehearing or in the Alternative, suggestion for Hearing or Rehearing En Banc" was denied on August 12, 1983. (Appendix B.) However, on Petitioner's "Motion for Stay of Mandate Pending application for Certiorari", the Third Circuit stayed the Mandate, allowing Petitioner until September 18, 1983 to petition this Court for Certiorari. (Appendix C.)

JURISDICTION

The final judgment of the Court of Appeals was entered on August 12, 1983. This petition is timely filed within sixty (60) days of the final judgment of the lower court. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. In a criminal tax prosecution, must the Trial Court submit to the jury the question of legal residence/venue, where there is a dispute as to the factual existence of venue? (The First, Second and Fifth Circuits hold yes; the Third Circuit holds no.)

II. In a charge of willful failure to file a federal income tax return, 26 U.S.C. §7203, is the prosecutor required to prove beyond a reasonable doubt, legal residence/venue. (The Second, Fifth, Ninth, and Tenth Circuits hold yes; the Third Circuit holds no.)

III. Does the accused in a criminal tax prosecution have, under 18 U.S.C. §3237(b), the absolute right to change the venue to his place of legal residence? (The Fifth, Seventh and Ninth Circuits hold yes; the Third Circuit holds no.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy tne right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been commited, which district shall have been previously ascertained by law . . . .

STATEMENT OF THE CASE

Petitioner was charged and convicted by jury trial of two counts of alleged willful failure to file federal income tax returns for the calendar years 1977 and 1978. The charges were brought by Grand Jury indictment within the U.S. District Court for the Western District of Pennsylvania.

Pre-trial, and throughout trial, Petitioner argued that venue was not proper for reason that he was not a legal and permanent resident of the Western District of Pennsylvania but rather was a legal and permanent resident of Phoenix, Arizona. He also requested change of venue pursuant to 18 U.S.C. §3237(b), which section guarantees change of venue in a tax crime such as charged, where the change is to be made to the District of which the defendant is a legal resident. Defendant placed before the court, by way of affidavit and Offers of Proof at time of trial, numerous facts supporting his allegation that he never intended to be a legal and permanent resident of Pennsylvania, but rather temporarily lived in Pittsburgh as a transient.

The Trial Court took the position

that the question of legal residence, and therefore, venue, was one of law for the Court, and refused not only the request for change of venue, but refused to submit the question as a question of fact to the jury. Petitioner presented timely request of jury instructions to the effect that the government was required to prove beyond a reasonable doubt that the Petitioner was a legal resident of the Western District of Pennsylvania. These instructions were refused and the Court throughout the trial refused to allow Petitioner to present his Sixth Amendment defense that he was charged in the wrong district.

REASONS FOR GRANTING THE WRIT

I. Because of the importance of the constitutional questions to tax law, and because of the express conflict between the federal circuit courts and the recurrence of the issue on appeal, this Court should decide whether the trial court should submit to the jury the question of legal residence/venue where, in a criminal tax prosecution, there exists a dispute as to the factual existence of venue.

II. Because of the importance of the constitutional question to tax law, and because of the express conflict between the federal circuits and recurrence of the issue on appeal, this Court should decide whether the prosecutor is required to prove beyond a reasonable doubt legal residence/venue in

a case of willful failure to file federal income tax returns, 26 U.S.C. §7203.

III. Because of the importance of the constitutional question to tax law, and because of the express conflict between the federal circuit courts and the recurrence of this issue on appeal, this Court should decide whether the accused in a criminal tax prosecution has, under 18 U.S.C. §3237(b), the absolute right to change of venue to his place of legal residence.

I.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTIONS TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUIT COURTS AND THE RECURRENCE OF THE ISSUE ON APPEAL, THIS COURT SHOULD DECIDE WHETHER THE TRIAL COURT SHOULD SUBMIT TO THE JURY THE QUESTION OF LEGAL RESIDENCE/VENUE WHERE, IN A CRIMINAL TAX PROSECUTION, THERE EXISTS A DISPUTE AS TO THE FACTUAL EXISTENCE OF VENUE.

Even the government, at page 19 of its Response Brief to the Third Circuit, conceded that in numerous circuits, the question of venue must be submitted to the jury, the government stating:

> Although there are cases in other circuits which hold that under certain circumstances, the issue of whether venue was properly laid must be submitted by properly instructed jury, see U.S. v. Dziurgot, 664 F.2d 6 (1st Cir., 1981); U.S. v. Blackcloud, 590 F.2d 270 (8th Cir., 1979); U.S. v. Grammaticos, 633 F.2d 1013 (2nd Cir., 1980), this circuit has never so held. Nor should it ....

The government further conceded that a majority of other circuits have held that the government at least need establish venue by preponderance of the evidence, government's brief at 25. See U.S. v. Panebianco, 553 F.2d 447 (2nd Cir. 1976); U.S. v. Lisowski, 504 F.2d 1268 (7th Cir. 1978); U.S. v. Haley, 500 F.2d 308 (8th Cir. 1974); U.S. v. Luton, 586 F.2d 1021 (5th Cir. 1973).

And finally, the government conceded at Page 22 of its Brief, that some circuits have held that venue must be submitted to the jury where there is a dispute as to the factual existence of venue:

> In the alternative, even those cases which hold that the question of venue must be submitted to the jury under some circumstance require that the question of venue be submitted only where there is a dispute as to the factual existence of venue. See U.S. v. Blackcloud, 590 F.2d 278 (8th Cir. 1979)....

In the case at bar, the District Court denied the Defendant his pre-trial and trial attempt to even raise lack of proper venue as a defense, notwithstanding Defendant's sworn allegations which raised the factual issue of his legal residence.

The Third Circuit, without opinion, held in effect that the government in a tax case such as this need not prove beyond a preponderous of the evidence that the Defendant was a legal resident of the subject district, much less prove beyond a reasonable doubt that the Defendant was a legal resident of the subject district. Notwithstanding the Third Circuit's judg-

ment in this case, it was the Third Circuit which recognized in U.S. v. Passodelis, 615 F.2d 975, 976 (3rd Cir. 1980) the importance of venue in a criminal case, reversing the conviction due to insufficient evidence to show venue, and relying upon Article III, Section II, Clause 3 of the United States Constitution and the Sixth Amendment to the U.S. Constitution, stating:

> The question of where an accused shall stand trial was a matter of such importance to those who wrote the Constitution and the Bill of Rights that they dealt with it in two separate provisions.

II.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUITS AND RECURRENCE OF THE ISSUE ON APPEAL, THIS COURT SHOULD DECIDE WHETHER THE PROSECUTOR IS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT LEGAL RESIDENCE/VENUE IN A CASE OF WILLFUL FAILURE TO FILE FEDERAL INCOME TAX RETURNS, 26 U.S.C. §7203.

Under charge of willful failure to file federal income tax return, 26 U.S.C. §7203 Petitioner urges, as many Circuits have held, that the government must prove beyond a reasonable doubt that Defendant was required to file a federal income tax return in the district in which the crime is alleged to have been committed, or within the IRS Service Center serving said District. For this reason, the government was required to prove beyond a reasonable doubt that this Defendant was a legal resident of the District for the U.S. District Court, Western District of Pennsylvania. By the Trial Court's adament refusal to submit this question of fact to a panel of twelve impartial jurors, Defendant was denied his Fifth Amendment right to due process of law, and his Sixth Amendment right to trial by jury in the proper district. (See charging statute, App. D)

This Court should consider the legion of authority by way of other circuit opinions which have held, expressly, that the Government must prove defendant's legal residence beyond a reasonable doubt in a charge of failure to file federal income tax return. In U.S. vs. Brewer, 486 F.2d 507 (10th Cir. 1973), the Court held, at 509:

> The prosecution must then establish beyond a reasonable doubt that the defendant's residence in this, a tax case, was Oklahoma City. (Emphasis Added.)

In U.S. vs. Calhoun, 566 F.2d 969, (5th Cir. 1978), the Court stated at 973:

> The Court instructed the jury that in order to convict they had to find beyond a reasonable doubt that defendant was a legal resident of the middle district during the two years in question. (Emphasir Added.)

See also similar holdings of other circuits: U.S. vs. Commerford, 64 F.2d 28,

(2nd Cir. 1933); Yarborough vs. U.S., 230 F.2d 56, (4th Cir. 1956); U.S. vs. Youse, 387 F.Supp 132 (E.D. Wisc. 1975); U.S. vs. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960); U.S. vs. Clinton, 464 F.2d 574 (9th Cir. 1978); U.S. vs. DeMarco, 394 F.Supp 611, (D.D.C. 1975); U.S. vs. Dalitz, 248 F.Supp. 238 (S.D. Calif. 1965).

In Brewer, supra, defendant was charged and tried for failure to file federal income tax returns. Having been tried and convicted within the United States District Court for the Western District of Oklahoma, defendant argued on appeal that the evidence was insufficient to establish that his legal residence was Oklahoma City, Oklahoma, located within the Western District. In deciding the issue, the Court noted at 509 that:

> The term "residence" has been equated with domicile. See

> Pietro Crespi, 44 B.T.A. 670, 674, (1941), Samuel W. Weis, 30 B.T.A. 478, 486, (1934); L.B. Peples, 27 B.T.A. 879, 882 (1933); Gates vs. Commissioner, 199 F.2d 291, (10th Cir. 1952). This requires residence and intention to remain, and intention is a highly important element.

And in Calhoun, supra, another failure to file income tax return case, the court approved the following jury instruction:

> "Legal residence" means the permanent fixed place of abode which one intends to be his residence and to return to it despite temporary residences elsewhere or absenses. In determining whether the defendant was a legal resident of the Leesburg [Florida] area, you may consider whether or not the defendant intended to remain in St. Croix or St. Maarten permanently, or whether he intended to return from those islands to the Leesburg area.

In the case at bar, the Court accepted as uncontroverted the facts regarding Defendant's legal residence, and his intentions toward legal residence. The Court was of the

opinion from commencement of trial, that as a matter of law Defendant was a legal resident of Pittsburgh, Pennsylvania on April 15th for the years in question. The Government did not submit controverting affidavits nor present evidence, for Defendant's Motion for Evidentiary Hearing on the Issue was denied.

Under the Sixth Amendment to the United States Constitution, an accused cannot be tried in a district other than the district in which the offense was commited. Salinger vs. Loisel, 44 S.Ct. 519, 522 (1924). See also, Commerford, supra, at 32, in which, in a case of failure to file federal income tax returns, the U.S. Court of Appeals for the Second Circuit stated:

> And where the offense, as here, consists of the failure to file a document,

> it is commited in the place where the document should have been filed and not elsewhere. [Citing two Supreme Court cases and another Second Circuit case.]

In Zicarelli vs. Gray, 543 F.2d 466, (3rd Cir. 1976) the court recognized, at 477 the Sixth Amendment principle that "a trial must take place before a jury drawn within the state and federal judicial district in which the crime was commited...."

III.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICTS BETWEEN THE FEDERAL CIRCUIT COURTS AND THE RECURRENCE ON THIS ISSUE ON APPEAL, THIS COURT SHOULD DECIDE WHETHER THE ACCUSED IN A CRIMINAL TAX PROSECUTION HAS, UNDER 18 U.S.C. §3237(b), THE ABSOLUTE RIGHT TO CHANGE OF VENUE TO HIS PLACE OF LEGAL RESIDENCE.

Defendant timely moved for Change of Venue or in the Alternative, for Evidentiary Hearing under 18 U.S.C. §3237(b), which

motions were denied. Said section provides in part as follows (App. E):

> . . . where an offense is described in §7203 of the Internal Revenue Code of 1954. . . and prosecution has begun in the judicial district other than in the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun elect to be tried in the district in which he was residing at the time the alleged offense was commited. . . . (Emphasis Added.)

In the case of U.S. vs.Youse, 387 F.Supp 132 (D.C. Wisconsin 1975) (7th Cir.), defendant was charged with income tax violations and moved for change of venue under 18 U.S.C. §3237. The court held that a motion under said section is not directed towards discretion, but that the defendant was granted by Congress an absolute right to be tried for certain

violations in the district of his residence. See also, U.S. vs. Wortman, 26 F.R.D. 183 (D. Ill. 1960) (7th Cir.); U.S. vs. Calhoun, 566 F.2d 969, 973 (5th Cir. 1978); U.S. vs. Brewer, 486 F.2d 507, 509 (10th Cir. 1973).

This very issue was most recently decided in favor of the accused by the U.S. Court of Appeals for the Ninth Circuit in the case of U.S. vs. Solomon, 693 F.2d 68, (9th Cir. 1982). See also, U.S. vs. Dalitz, 248 F.Supp. 238 (S.D. Calif. 1965); U.S. vs. Demarco, 394 F.Supp 611, (D. D.C. 1975); U.S. vs. Rosenberg, 226 F.Supp. 199 (S.D. Fla. 1964); U.S. vs. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960); U.S. vs. Kimble, 186 F.Supp. 616 (S.D. N.Y. 1960). See Wortman, supra, at 192 wherein the court stated:

> The Congress apparently did not provide the courts with discretion in determining the facts or circumstances under which a transfer would be justified; rather, Congress intended that defendants be given the absolute right to be tried for alleged violation of the sections enumerated in paragraph (b) of section 3237 in the district of the residence regardless of the distance involved. (Emphasis Added.)

See Senate Report No. 1625, 89th Congress reprinted in 1966 U.S. Code Congressional and Administrative News 3676, 3681 (addition to §3237(b) of willful failure to file income tax return as a crime for which the transfer option would be available a defendant); Senate Report No. 1952, 85th Congress, Second Session at 1, reprinted in 1958 U.S. Code Congressional and Administrative News 3261, 3262 (original "home venue option"). For a narrow reading of the subject section, compare In re, United States (Clemente) 608 F.2d 76, (2nd Cir. 1979).

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the Judgment entered herein by the U.S. Court of Appeals for the Third Circuit.

DATED this 15th day of September, 1983.

MacPHERSON & McCARVILLE, P.A.

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Phoenix, Arizona 85021
Attorney for Petitioner
HOWARD A. HULL
(602) 944-3328

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5748

UNITED STATES OF AMERICA

vs.

HOWARD HULL,

Appellant

(Criminal No. 82-112-W.D.Pa.-Pittsburgh)

District Judge: Honorable Gerald J. Weber

Submitted Under Third Circuit Rule 12(6)
July 15, 1983

BEFORE: SEITZ, Chief Judge, SLOVITER, Circuit Judges, and LORD, District Judge.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the district court erred in denying defendant's motion to dismiss for lack of

jurisdiction, (2) the district court erred in denying defendant's motion for change of venue, (3) the evidence was insufficient to establish that defendant's legal residence was Pittsburgh, Pennsylvania, and (4) defendant was denied his constitutional rights to fair trial and due process of law, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court

_____
Chief Judge

ATTEST:

_____
Sally Mrvos, Clerk

DATED: July 18, 1983

*Joseph S. Lord, III, Judge of the United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5748

UNITED STATES OF AMERICA,

vs.

HOWARD A. HULL,

Appellant

(Criminal No. 82-112-W.D.Pa.-Pittsburgh)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, BARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and LORD, District Judge.*

The petition for rehearing filed by appellant in the above entitlted case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz,
Chief Judge

DATED: August 12, 1983

*Joseph S. Lord, III, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5748

UNITED STATES OF AMERICA

vs.

HOWARD A. HULL,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 18, 1983.

Chief Judge

DATED: AUG 19, 1983

APPENDIX D

Sec. 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation) or imprisoned

not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure.

APPENDIX E

§3237. Offenses begun in one district and completed in another.

. . .

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing

at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Constance M. Bowden
Assistant U.S. Attorney
633 United States Post
Office & Courthouse
Pittsburgh, PA 15219

on this 15 day of September, 1983.

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CLERK

No. 83-450

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD A. HULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly refused to submit the venue question to the jury.

2. Whether venue must be proven by a preponderance of the evidence or beyond a reasonable doubt.

3. Whether the courts below correctly held that petitioner was not entitled to a change of venue under 18 U.S.C. 3237(b).

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Fed. R. Crim. P. 18 3

Miscellaneous:

H.R. Rep. 1915, 89th Cong., 2d Sess. (1966) 5, 6

S. Rep. 1625, 89th Cong., 2d Sess. (1966) 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-450

HOWARD A. HULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is not reported. The pretrial memorandum order of the district court (App., *infra*, 1a-9a) also is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1983. A petition for rehearing was denied on August 12, 1983 (Pet. App. 3-4). The petition for a writ of certiorari was filed on September 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts of willfully failing to file federal income tax returns for the years 1977 and 1978, in violation

of 26 U.S.C. 7203. He was sentenced to a one-year term of imprisonment, to be followed by five years' probation, and a fine of $10,000.

From July 1977 through February 1980, petitioner lived in the Western District of Pennsylvania. During that time, he was employed by General Development Corporation, a real estate development and sales company, in its Pittsburgh office. App., *infra*, 6a-8a; C.A. App. A12, A14, A34; Tr. 28.[1] Although petitioner earned gross income of $22,538.98 in 1977 and $58,759.57 in 1978, and therefore was required to file income tax returns for those years, he failed to comply with this requirement.[2] Instead, for each year, petitioner filed a Form 1040 on which he failed to list any information regarding his income. Tr. 32, 45-47, 49, 52-55.[3] As a result, petitioner was charged in a two-count indictment with willfully failing to file federal income tax returns for the years 1977 and 1978 (C.A. App. A5-A6).

Prior to trial, petitioner moved to dismiss the indictment for lack of jurisdiction (C.A. App. A7-A15) and also moved for a change of venue (C.A. App. A19-A22). Both motions

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[1]References to the trial transcript are taken from the government's brief in the court of appeals.

[2]Petitioner's filing status for 1977 was married, filing jointly. A person having such status was required to file if his gross income exceeded $4,700. Petitioner's filing status for 1978 was married, filing separately. A person having such status was required to file if his gross income exceeded $750. Tr. 52-55.

[3]For 1977, petitioner filed a Form 1040 containing his name, social security number, address and occupation. On the line on which he should have reported his income, petitioner placed an asterisk. The asterisk referred to a paragraph that read: "This means specific objection is made under the Fifth Amendment of the U.S. Constitution to the question as to Federal Reserve notes and that similar objection is made to the question under the First, Fourth, Seventh, Eighth, Ninth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Nineteenth Amendments." Tr. 45-46. Various tax protest materials were attached to the Form 1040. Tr. 46. Petitioner's 1978 submission was similar. Tr. 49.

were based on the contention that a defendant in a prosecution under 26 U.S.C. 7203 is entitled to be tried in the district in which he was domiciled at the time of the alleged offense; petitioner claimed he was an Arizona domiciliary. The district court denied petitioner's motions as well as his request that the venue question be submitted to the jury (App., *infra*, 6a-8a; C.A. App. A47).

The court of appeals affirmed summarily (Pet. App. 1-2).

ARGUMENT

Petitioner raises three issues on which, he claims, the courts of appeals are in conflict. None of these issues, however, is presented by this case. Moreover, the issues that are presented were correctly decided by the courts below. Further review therefore is unnecessary.

1. Petitioner first contends (Pet. 8) that the Court should grant his petition in order to "decide whether the trial court should submit to the jury the question of legal residence/venue where, in a criminal tax prosecution, there exists a dispute as to the factual existence of venue." That issue is not presented by this case, however, since determination of the proper venue did not turn on a disputed question of fact. Rather, the question whether venue in this case was proper depends on the construction of the words "legal residence," as used in 26 U.S.C. 6091(b)(1)(A)(i), which is a question of law. The courts below correctly determined that Congress used the phrase "legal residence" in Section 6091 to refer to the taxpayer's actual, physical residence, not to his domicile.

"Except as otherwise permitted by statute or by these rules, * * * prosecution shall be had in a district in which the offense was committed." Fed. R. Crim. P. 18; see also U.S. Const. Amend. VI. It is well settled that the offense of failing to file an income tax return is committed in the judicial district in which the taxpayer is required to file. See,

e.g., United States v. *Rice*, 659 F.2d 524, 526 (5th Cir. 1981); *United States* v. *Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978); *United States* v. *Brewer*, 486 F.2d 507 (10th Cir. 1973), cert. denied, 415 U.S. 913 (1974). Under 26 U.S.C. 6091(b)(1)(A)(i), an individual taxpayer is required to file either in the internal revenue district in which his legal residence is located or at a service center serving that internal revenue district.

Petitioner acknowledged in his motion to dismiss (C.A. App. A12, A14) that he had "physically resided" and worked in Pittsburgh during the years in question. He contended, however, that the phrase "legal residence," as used in Section 6091, means domicile and that a taxpayer therefore is required to file his return in the district in which he intends to make his permanent residence. He further contended that since he intended Arizona to be his permanent residence, he could be indicted and tried only in the District of Arizona. C.A. App. A12, A15.[4]

The district court disagreed, holding that the phrase "legal residence," as used in Section 6091, did not mean domicile, that petitioner's "legal residence" during the time in question was Pittsburgh, and that petitioner therefore was required to file with either the Internal Revenue Service district office in Pittsburgh or the Service Center in Philadelphia (App., *infra*, 6a-8a). Following the denial of his pretrial motions, petitioner requested the court to submit the venue question to the jury, persisting in his contention that his alleged intent to return to Arizona was determinative of that issue (C.A. App. A36-A40, A43-A45). The district court rejected petitioner's request, reiterating that legal residence does not mean domicile and that petitioner's intent therefore was irrelevant (C.A. App. A43-A45).

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[4]We note, however, that petitioner submitted the incomplete Forms 1040 for 1977 and 1978 to the Internal Revenue Service Center in Philadelphia. App., *infra*, 7a-8a.

That determination was correct. Perhaps the strongest evidence that Congress did not use the phrase "legal residence" in 26 U.S.C. 6091(b)(1)(A)(i) to mean "domicile" is that, when Congress intended to connote "domicile" it used that precise term. Thus, in subsection (3) of 26 U.S.C. 6091(b), Congress provided that estate tax returns were to be made "in the internal revenue district in which was the *domicile* of the decedent at the time of his death * * *." 26 U.S.C. 6091(b)(3)(A)(i) (emphasis added).

The construction the courts below placed on the phrase "legal residence," as used in Section 6091, also is supported by the provision made in Section 6091(b)(4) for the "hand-carrying" of tax returns. In 1966 Congress amended Section 6091 to permit the Treasury Department to require taxpayers to mail their tax returns directly to one of the seven regional service centers, where the processing of returns is completed, rather than to one of the 58 district offices, as permitted under prior law. The purpose of the change was to "eliminat[e] the double handling and extend[] the economics of volume processing to the initial processing steps." S. Rep. 1625, 89th Cong., 2d Sess. 1 (1966); H.R. Rep. 1915, 89th Cong., 2d Sess. 1 (1966). The new law, however, required the Treasury Department to continue to permit the taxpayer to "hand-carry" his return to the district office in which his legal residence was located. Congress's concern that taxpayers continue to be permitted to file their returns "by hand" is more consistent with a construction of "residence" that turns on actual, physical presence than one that depends on where the taxpayer intends to reside in the future. Indeed, both the House and Senate reports described this provision as permitting "a taxpayer who desires to file his return in person [to] continue to do so as at present by hand carrying it to his *local* Internal Revenue Service office." H.R. Rep. 1915, *supra*, at 1-2 (emphasis added); S. Rep. 1625, *supra*, at 1 (emphasis added).

An amendment to 18 U.S.C. 3237(b) made in the same 1966 statute that amended Section 6091 is further evidence that the phrase "legal residence" was intended to refer to actual, physical residence. As noted above (page 5, *supra*), prior to the 1966 amendment of Section 6091 an individual taxpayer was required to file his return in the internal revenue district in which his legal residence was located. Prosecution for failure to file therefore was required to be brought in the judicial district in which that internal revenue district was located. As a result of the 1966 amendment to Section 6091, however, a prosecution under Section 7203 also could be brought in the judicial district in which the service center was located, which, in most cases, would be different from the judicial district in which the taxpayer's internal revenue district was located. H.R. Rep. 1915, *supra*, at 5; S. Rep. 1625, *supra*, at 5. Because Congress was of the view (*ibid.*) that "a prosecution for willful failure to file a return should be brought as close to the defendant's residence as possible in order to avoid hardship to him, his attorneys, and witnesses," Congress amended 18 U.S.C. 3237(b) to permit a defendant charged with a violation of 26 U.S.C. 7203 to "elect to be tried in the district in which he was residing at the time the alleged offense was committed." The nature of Congress's concerns makes clear that it used the words "residing" and "residence" to mean the defendant's actual, physical residence, rather than a location where he might intend to live in the future.

Because the phrase "legal residence" in Section 6091 refers not to domicile but rather to the place where the taxpayer actually, physically resides, petitioner's alleged intent to live in Arizona was irrelevant to the venue issue.[5]

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[5] *United States* v. *Calhoun*, *supra*, and *United States* v. *Brewer*, *supra*, are not necessarily to the contrary. Although the courts in both those cases looked to the taxpayer's domicile and, hence, to his intent, in both cases the courts held that proof of domicile was *sufficient* to

Moreover, because petitioner did not dispute that he lived and worked in Pittsburgh at the time of the alleged offenses, there was no issue of fact as to petitioner's legal residence. The district court therefore properly declined to submit the venue issue to the jury.[6]

2. Petitioner also contends (Pet. 13-19) that the Court should grant the petition in order to resolve an alleged conflict concerning whether the government must prove venue beyond a reasonable doubt or only by a preponderance of the evidence. This issue also is not presented by the instant case because, as shown above, there is no factual dispute bearing on the question of venue.

In any event, there is no conflict among the circuits concerning the burden of proof that requires resolution by this Court. The First, Second, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits all have held that venue need be established only by a preponderance of the evidence. See *United States* v. *Massa*, 686 F.2d 526, 527-528 (7th Cir. 1982); *United States* v. *Wuagneux*, 683 F.2d

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establish "legal residence" for venue purposes. In neither case was the court presented with the type of claim petitioner makes here — that notwithstanding his continuous, physical presence in the district where prosecution was instituted, venue was improper because he intended to make his permanent residence elsewhere.

[6]Petitioner does not claim that the question of venue must be submitted to the jury in the absence of a factual dispute and, to our knowledge, no court has so held. See *United States* v. *Massa*, 686 F.2d 526, 530-531 (7th Cir. 1982) ("where venue is not in issue, no court has ever held that a venue instruction must be given. Although venue is an essential element which the Government must prove, it is an element more akin to jurisdiction than to the substantive elements of the crime. * * * It is therefore particularly suited to determination by the court as a matter of law where venue is not disputed and the Government presents sufficient evidence of venue to meet the preponderance of the evidence standard"); see also *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402-404 (1927).

1343, 1356-1357 (11th Cir. 1982), cert. denied, No. 82-1687 (Oct. 3, 1983); *United States* v. *Cordero*, 668 F.2d 32, 44 n.18 (1st Cir. 1981); *United States* v. *White*, 611 F.2d 531, 534-535 (5th Cir.), cert. denied, 446 U.S. 992 (1980); *United States* v. *John Bernard Industries, Inc.*, 589 F.2d 1353, 1361 (8th Cir. 1979); *United States* v. *Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Powell*, 498 F.2d 890, 891 (9th Cir.), cert. denied, 419 U.S. 866 (1974); *United States* v. *Charlton*, 372 F.2d 663, 665 (6th Cir.), cert. denied, 387 U.S. 936 (1967). These decisions are manifestly correct, else cases presenting any doubt about the proper locus of prosecution could not be tried anywhere.

As petitioner notes (Pet. 15), in *United States* v. *Brewer*, 486 F.2d at 509, the Tenth Circuit stated that venue must be established beyond a reasonable doubt. In that case, however, the court of appeals upheld the venue determination and therefore was not presented with the question whether a lesser quantum of proof also would have been sufficient. In view of the abundance of intervening case law to the effect that venue need be established by only a preponderance of the evidence, it cannot be assumed, notwithstanding its previous dictum to the contrary, that the Tenth Circuit would not join that great weight of authority.[7]

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[7]Petitioner also relies (Pet. 15) on *United States* v. *Calhoun*, *supra*, as authority for the proposition that the government must establish venue beyond a reasonable doubt. In that case, however, the court of appeals merely noted (566 F.2d at 973) that the district court had required proof of venue beyond a reasonable doubt and, indeed, found that the government had carried that burden. Moreover, subsequent decisions by the Fifth Circuit make clear that that court is in accord with the vast majority of courts of appeals, which have held that venue need be established only by a preponderance of the evidence. See, *e.g.*, *United States* v. *White*, *supra*.

3. Petitioner argues finally (Pet. 19-22) that the Court should decide whether the right afforded by 18 U.S.C. 3237(b) to a change of venue from a judicial district other than that in which the defendant was residing at the time of the alleged offense is absolute or discretionary with the trial court. Since petitioner was prosecuted in the district of his residence, any questions concerning the right of a defendant prosecuted elsewhere to secure a change of venue to such district are manifestly irrelevant here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

DOJ-1983-12

APPENDIX

In the United States District Court for the Western District of Pennsylvania

UNITED STATES OF AMERICA Plaintiff	)	
vs.	)	Criminal No. 82-112
HOWARD A. HULL Defendant	)	

MEMORANDUM ORDER

The defendant's counsel has filed a series of documents (Doc. Nos. 7-30), which contains some 24 pretrial motions. Many are duplicative or overlapping and some documents contain more than one motion. Others are in the nature of motions *in limine* to control the trial of the action.

These motions are almost identical with a similar series of motions filed by the same counsel in U.S.A. v. John F. Mekic, Cr. 82-113. Because these two indicments [*sic*] were returned the same day counsel may be forgiven for the duplicate motions which were filed at about the same time. However, rulings made at Cr. 82-113 largely control the disposition of the identical motions before us.

Many of the motions had to do with the method of jury selection in this district and revealed that counsel was unfamiliar with our jury selection plan. Communication with counsel reveals that he no longer wishes to pursue certain of his motions either because he had become familiar with jury panel selection methods here or because of the answer of the United States to his motions.

I.

The following motions therefore are denied as having been withdrawn by counsel:

1. (Doc. No. 7) - *Motion for discovery of information obtained by the government regarding the jury panel.*

2. (Doc. No. 14) - *Motion to Dismiss due to improper jury panel selection.*

3. (Doc. No. 23) - *Defendant's Motion for new jury panel.*

4. (Doc. No. 17) - *Motion for disclosure of informants.*

5. (Doc. No. 24) - *Motion for production of wire tap authorization.*

6. (Doc. No. 26) - *Motion to disclose inducements to prospective government witnesses.*

7. (Doc. No. 8) - *Motion for discovery and production of all jury contact by the government.*

II.

The following motions require little discussion and are denied for the reasons noted:

8. (Doc. No. 9) - *Motion for discovery and inspection pursuant to Fed. R. Crim. P. 16.* It appears from the government's response that defendant has been supplied with all materials to which he is entitled under Fed. R. Crim. P. 16. The defendant is not entitled to disclosure of the names of government's witnesses or their statements until such witnesses are produced for direct testimony by the government.

9. (Doc. No. 30) - *Defendant's motion for discovery of IRS agents' reports.* The government's response indicates that it is well aware of its obligations imposed upon the government by *Brady*, and that it has carefully perused reports of the special agent and revenue agent and has found no such

exculpatory evidence. Otherwise the reports of such agents are exempt from discovery under Fed. R. Crim. P. 16(a)(2). Only after the conditions of the *Jencks Act,* 18 U.S.C.3500 are reports of government agents to be provided.

10. (Doc. No. 25) - *Motion for examination and inspection under Brady v. Maryland.* It appears from this text that in duplicating this motion from the prior case counsel became confused with the location of the government agencies involved. The government has responded to this motion to the effect that it has examined the entire file and found no exculpatory material. The motion also calls for the disclosure of names and statements of government witnesses. The government is not required to disclose the names of its witnesses under Fed. R. Crim. P. 16 and the rule itself provides that the disclosure of statement of witnesses can only be provided under the provisions of the *Jencks Act,* 18 U.S.C. 3500, after the government witness has testified on direct examination. The same document requests the production of grand jury minutes of any grand jury that has inquired into matters which are subject of the instant indictment. Defendant has no pretrial right of disclosure to the minutes of a grand jury absent the showing required under Fed. R. Crim. P. 6(e) of a substantial likelihood of gross or prejudicial irregularity in the conduct of the grand jury. A statement of any witness to the grand jury would be subject to production after that witness had testified on direct examination at trial under the provisions of 18 U.S.C. 3500(e).

11. (Doc. No. 29) - *Motion for disclosure of Grand Jury minutes.* Defendant makes a separate motion repeating his motion for disclosure of grand jury minutes and the same is denied for the reasons set forth in the foregoing paragraph.

12. (Doc. No. 20) - *Motion under Fed. R. Crim. P. 12(d)(2).* Defendant moves for notice of the government's intention to use in its evidence in chief any evidence which the defendant may entitle to discover [*sic*] under Rule 16. The motion is denied on the government's response that it has furnished to defendant all of the materials required to be produced under Fed. R. Crim. P. 16.

13. (Doc. No. 28) - *Motion to dismiss for Duplicitous Indictment.* Defendant moves to dismiss the indictment as being duplicitous or in the alternative to compel the government to elect. We find the motion ill-grounded since the indictment charges a single offense in each of its two counts [p]ertaining to the income tax return in each of the two calendar years, 1977 and 1978.

14. (Doc. No. 12) - *Defendant's motion to dismiss for lack of jurisdiction under 18 U.S.C. 3231.* This motion is ill-grounded in arguing that "tax crimes" are not "offenses" against the United States and therefore not within the jurisdictional grant of 18 U.S.C. 3231. However, § 7203 of the Internal Revenue Code renders a wilful failure to file an income tax return an offense against the United States.

15. (Doc. No. 10) - *Defendant's motion to dismiss or to suppress due to abuse of process under 26 U.S.C. 7609.* A special agent of the IRS issued a summons to a bank during the investigation of this case. This question was considered and decided in the case of *United States v. Northside Deposit Bank,* 498 F. Supp. 133 (W.D. Pa. 1980) *aff'd* C.A. 3rd Cir. No. 81-1026, Sept. 11, 1981.

III.

The defendant has filed a group of motions having to do with the conduct of the trial in the nature of *in limine* motions on the admission or suppression of certain items of evidence.

16. (Doc. No. 16) - *Motion in limine regarding tax liability and net worth.* Defendant seeks to bar any evidence of his tax liability for the years in question or to show defendant's net worth or change in net worth. Such evidence of income and tax due is highly probative of wilfulness and motive, is relevant to the charge made and is properly admitted into evidence in a case charging failure to file a return. The government has stated that it will not attempt to prove defendant's guilt on a net worth theory. The motion is denied.

17. (Doc. No. 27) - *Defendant's motion to suppress any and all information submitted by defendant on a tax return or in the alternative motion for "good faith erroneous claim of privilege" defense and instruction.* The defendant may not use the Fifth Amendment privilege as justification for his failure to list income on the return. We can find no basis to suppress the form 1040 that defendant submitted to the Internal Revenue Service each year in question. The question of the instruction to be given by the court is premature until the evidence at trial has been submitted and request for instructions based on such evidence or lack of evidence are considered by the court. The motion is denied.

18. (Doc. No. 22) - *Defendant's motion to exclude government employees from the jury panel.* The court knows of no reason to exclude employees of the federal government from the jury panel or of any grounds now known to challenge any such employee for cause. At the time of selection of a jury one of the standard inquiries made by the court on voir dire is the employment of each prospective juror and in particular the governmental employment or the law enforcement employment of such juror. The defendant may challenge any such person under his peremptory challenges or if good cause is shown may assert a challenge for cause which the court can consider at the time. The motion is denied.

19. (Doc. No. 21) - *Motion that jurors be bound by oath or affirmation to support the United States Constitution.* There is no constitutional requirement that jurors shall be bound by oath or affirmation to support the Constitution of the United States, and we know of no statutory or judicial interpretation imposing such a requirement. The motion is denied.

20. (Doc. No. 19) - *Motion to extend time to file pretrial motions.* The motion is denied.

21. (Doc. No. 13) - *Defendant's motion to allow association of out-of-state counsel.* This is customarily done in this court when counsel from another jurisdiction appears. The out-of-state counsel is admitted for the trial of the case in question, or as we say "pro haec vice" [*sic*]. Counsel is reminded, however, of the local rule which requires the association with a counsel admitted to the bar of this court maintaining an office in this district. The aid and advice of a local counsel is a very valuable advantage for an out-of-state counsel and had it been observed in this and its companion case the necessity for many of the motions presented would have been avoided. The motion is granted.

IV.

Defense counsel has advised that he puts particular importance on the following two motions and desires to present evidence of the defendant's intention as to "residence" or "domicile". We have considered the counsel's statements and the documents presented. Even accepting these facts as true we find them immaterial to the issue.

22. (Doc. No. 11) - *Defendant's motion to dismiss for lack of jurisdiction.* Defendant argues that although he physically resided in Pennsylvania during the years charged in the indictment, he was not a legal resident of Pennsylvania during the years in question and, therefore, this court is

without jurisdiction with respect to the charge at issue. In support of that contention defendant submits a detailed statement of his wanderings throughout the United States. He worked in many states, he served in the United States Army, he was married outside of the United States the first time, and was later divorced. In 1973 he moved to Arizona, was married there, registered to vote there, was engaged in business there, and had a child born there, and purchased a family residence there. From 1975 defendant traveled and left his family in Arizona and worked in various states. However, in July 1977 defendant was transferred to Pittsburgh, Pa., to continue work for his employer and he remained in Pittsburgh, Pa., until February 1980. He now works in another state but contends that he intends ultimately to return to Arizona for permanent residency and he considers Arizona his legal and permanent residence and his domicile. However, the offense of failure to file an income tax return is committed in the judicial district in which the taxpayer is required to file and 26 U.S.C. 6091(b)(1)(A)(i)(ii) provides that returns must be filed either in the Internal Revenue District in which is located the legal residence or principal place of business of the person making the return or at a service center serving that Internal Revenue district. The government's response avers that defendant during 1977, 1978, and 1980 resided in Pittsburgh, Pa., at 253 Shasta Drive, and was employed by the General Development Corporation as manager of its Pittsburgh office at 400 Penn Center Blvd., Suite 707, Pittsburgh, Pa. Therefore, regardless of concepts such as domicile which are not relevant here his actual residence and his principal place of business was in Pittsburgh, Pa., during the years in question, 1977 and 1978, and he was required to file his tax returns either with the District Office of the Internal Revenue Service in Pittsburgh, or at the Service Center Mid-Atlantic Region, Philadelphia, Pa. The returns

in question, designated "Protest Returns", were mailed by defendant from Pittsburgh, Pa. to the Service Center in Philadelphia, Pa., and he listed his address on the 1977 Protest Return as 253 Shasta Drive, Pittsburgh, Pa. 15239. Similarly, the defendant attempted to file protest returns with the Commonwealth of Pennsylvania for the same years and gave the same Pittsburgh, Pennsylvania, address. Local Earned Income Tax Returns were filed by him with Plum Borough giving the same address. These returns all indicate his recognition that his residence and principal place of business was in Pittsburgh, Pennsylvania, during the years in question. We see no purpose in holding an evidentiary hearing where the defendant may wish to express his intention to make Arizona his domicile for certain purposes not connected with the charge in question. The motion is denied.

23. (Doc. No. 15) - *Motion for change of venue*. Defendant argues that under 26 U.S.C. 7203 he may file a motion to be tried in the district in which he was residing at the time alleged offense was committed. He wishes a change of venue to Arizona under this statute but we can see no applicability of the statute to him because, despite his emotional attachment to Arizona and his intention to become a domiciliary of that state sometime in the future, he was not a resident of Arizona at the time the offense was committed. The argument of defendant with respect to change of venue is similar to the argument that he raises contesting jurisdiction and is denied for the reasons given for the denial of that motion. Nor do we find any basis in Fed. R. Crim. P. 18 for such a change of venue. Rule 18 requires that prosecution shall be had in a district in which the offense was committed; the remainder of Rule 18 applies to fixing the place of trial within a district with due regard to the convenience of the witnesses and the prompt administration of justice. The motion is denied.

V.

Defendant has submitted a brief in support of the admissibility of government documents and court decisions for the purpose of establishing defendant's state of mind. This is not properly a motion and has not been docketed by the Clerk as such. The admissibility of documents will be determined by their relevance or admissibility at the time of trial. Similarly any limiting charge by the court will be determined by the nature of the evidence admitted. We do not know what particular documents or court decisions the defendant wishes to introduce into evidence and we can discern no grounds at this time for the admission of material of the type described. If the "legal material" which the defendant relies on provides some defense for the defendant this is a matter of law for the court to decide, and for the court to instruct the jury appropriately with respect to the law applicable to the facts in question. As a ruling *in limine* is not possible at this time because the court has not seem [*sic*] the specific documents the court will reserve ruling until they are presented. Treating the defendant's brief as a motion *in limine* the same is denied.

SO ORDERED this *2nd day of November, 1982.*

/s/ GERALD J. WEBER

GERALD J. WEBER
United States District Judge